CASE NO. 96223-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Petitioner,

v.

M. GWYN MYLES, individually and as Personal Representative of the Estate of WILLIAM LLOYD MYLES, deceased.

Respondent.

REPLY BRIEF

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I. IDENTITY OF PETITIONER

Petitioner, M. Gwyn Myles, individually and as Personal Representative of the Estate of William Lloyd Myles, seeks the relief designated in Part II, herein.

II. RELIEF REQUESTED

Petitioner asks this court to uphold the Order Denying the State of Washington Department of Correction's Motion for Summary Judgment entered in Clark County Superior Court on December 30, 2016. This Order was reversed by the Court of Appeals on July 24, 2018. A Petition for Review was filed on August 23, 2018.

III. ARGUMENT

In its Answer to Petition for Review filed with the court on October 24, 2018, Respondent, Department of Corrections (DOC) raises a new issue of "proximate cause". In it's *"Counterstatement of the Issues"*, DOC poses the following question:

> **2. Assuming a *"Taggert"* duty existed in January 2006, did Plaintiff Myles fail to raise an issue of material fact concerning proximate cause sufficient to survive summary judgment?**

See Page 3 of DOC's Answer to Petition for Review of M. Gwyn Myles filed with the court On October 24, 2018.

RAP 13.4 provides that a reply to an answer be limited to addressing only the new issues raised in the answer to the petition for review. Proximate cause is a new issue in the sense that it was not addressed or argued in Myles' Petition for Review filed with the court on August 23, 2018. However, because no legal argument or authority was presented by Respondent DOC within its Answer, Petitioner Myles can offer only a general response on the issue.

The summary judgment motion in this matter was filed by Respondent, DOC on October 18, 2016. (CP 229) In a summary judgment proceeding, the burden is on the moving party to prove there is no genuine issue as to a fact which could influence the outcome at trial. Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985) citing Jacobson v. State, 89 Wash.2d 104, 108, 560 P.2d 1152 (1977). In its Answer to Petition for Review, Respondent DOC poses the question of whether Myles has offered such proof as it relates to the issue of proximate cause when the burden is in fact on DOC and not on Myles. Nevertheless, Myles offers the following argument in response to this issue.

There are two elements to the issue of proximate cause, cause in fact and legal causation.

1. **Cause in Fact.**

Under Washington law, cause in fact refers to the "but for" consequences of an act -- the physical connection between the act and the injury. King. v. Seattle, 84 Wn.2d 239, 249, 525 P.2d 228 (1974). "It is a matter of what has in fact occurred." Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). As a general rule, the existence of a legal duty to a Plaintiff is a question of law but the breach of that duty and whether or not proximate cause exists are generally questions for a trier of fact. Hertog v. City of Seattle, 138 Wn.2d at 275, 979 P.2d 400 (1999). Once it has been determined that a legal duty exists, it is generally the jury's function to then decide the foreseeable range of danger. Briggs v. Pacific Corp, 120 Wn.App. 319, 322-23, 85 P.3d 369 (2003). Foreseeability of the injury to the plaintiff must be determined and again, this is up to a jury to decide. In Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), the Court found that a government agency has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of a criminal defendant and that such forseeeability was up to a jury to determine. Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable. Joyce v. State of Washington DOC, 155 Wn.2d 306, 315, 119 P.3d 825 (2005), citing Taggart, 188 Wn.2d at 217. "Foreseeability is normally an issue for

the jury, but it will be decided as a matter of law where reasonable minds cannot differ." Taggert at 224, quoting Christen v. Lee, 113 Wn.2d 479, 780 P.2d 1307 (1989).

There are also times when proximate cause can be decided as a matter of law. The guidelines for determining what is a question of fact or a matter of law are not precise and may depend on the actors and the circumstances involved. Herskovits v. Group Health Coop., 99 Wash.2d 609, 637 664 P.2d 474 (1983). When reasonable minds could reach but only one conclusion, questions of fact may be determined as a matter of law. LaPlante v. State, 85 Wash.2d 154, 531 P.2d 299 (1975).

The issue of proximate cause is not appropriately determined in a summary judgment proceeding unless there is just one reasonable conclusion possible. Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985). Based on the facts of this case, reasonable minds could differ as to the issue of proximate cause and therefore, it is up to a jury (or trier-of-fact) to determine whether or not the injury to Mr. Myles was reasonably foreseeable.

Myles has offered evidence to show that it is highly possible Villanueva-Villa would have remained in custody on January 27, 2006, the day when Mr. Myles was killed. DOC took it upon themselves to close supervision and never brought Villanueva-Villa's violations or new

arrests to the attention to the court. Material information was withheld from the court when DOC abruptly and prematurely closed Mr. Villanueva-Villa's supervision on January 13, 2006. (CP 48-49 and CP 377-381). DOC claims they were supervising Villanueva-Villa in "error" but the fact still remains that they were supervising him and he was under the direct control of DOC when these violations and new arrests occurred. The Court should have been advised of all material facts as to this offender, especially when his prior record consisted of numerous failures to appear and the two active DUI warrants that were pending when they closed supervision. (CP 366 and CP 371)

There are many facts in this case that could lead a jury to find that Villanueva-Villa would have been in jail on the night of January 27, 2006. With his two new DUI arrests (CP 366 and 371), his failure to appear at both arraignment hearings (CP 369 and 374), his prior felony bail jump (CP 120), and his prior DOC violations and failure to abide by the conditions of his negotiated sanction agreement with DOC (CP 48 and CP 365), reasonable minds could differ as to what sanctions and/or conditions the court would have imposed on Villanueva-Villa and whether those sanctions and conditions would have kept him in custody on January 27, 2006 or at least prevented him from drinking any alcohol during that time.

In addition, the warrant issued for his second DUI failure to appear was a no bail warrant. (CP 374 and CP 423)

Villanueva-Villa was finally apprehended on the night he killed Mr. Myles (CP 15) and subsequently brought to court on February 16, 2006 pursuant to a Motion filed by the Prosecuting Attorney for an Order Modifying and/or Revoking the Judgment and Sentence on both the Bail Jump (felony) and Vehicle Prowl 2 (misdemeanor) charges, which was the same judgment and sentence for which DOC was supervising Villaneuva-Villa (CP 317-324 and CP 325-336). At that hearing, the Court ordered Villanueva-Villa to serve another 30 days jail time on the Bail Jump (felony) charge. (CP 404-405)

Villanueva-Villa was again brought to court February 21, 2006 to face his prior two pending DUI charges (CP 418 and CP 423). At his arraignment on that date, the Honorable Judge John P. Hagensen imposed the following conditions on **both** DUI charges:

> Breath/Urine Testing
> Antabuse monitoring
> No alcohol or drugs
> Bail set at $10,000.00
> Supervised release
> Antabuse if medically able.
> (CP 418-422 and CP 423-427)

Based on these court orders and the additional conditions imposed, it is arguable that Villanueva-Villa would have been in jail on January 27,

2006 or if he was released, that he would have been monitored with breath/urine testing and Antabuse on that date. None of these protections were in place at the time of Mr. Myles' death due to DOC's failure to arrest Villaneuva-Villa while he was under the direct control and supervision of DOC. Reaching more than one conclusion is certainly possible with these facts and as a result, proximate cause in this particular case would be a question for the jury and not a matter of law for the court to decide on summary judgment.

The trial court found that issues of material fact existed in this matter when it denied DOC's Motion for Summary Judgment on December 30, 2016. (CP 679) The Court of Appeals disagreed and reversed the trial court's decision, which is of course, the basis for Myles' Petition for Discretionary Review.

2. **Legal Causation**

The second element of proximate cause is legal causation which involves a legal determination of whether liability should attach as a matter of law given the existence of cause in fact. Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Duty and legal causation are intertwined. Id. at 779. The focus of legal causation is on whether the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468,

951 P.2d 749 (1998). Establishing cause in fact involves a determination of what actually happened and is generally left to the jury. Evidence of factual causation exists if the jury could find that "but for" the defendant's actions, the plaintiff would not have been injured. Legal causation is for a court to decide as a matter of law only when the facts are not in dispute. Schooley at 478.

Causation does not have to be proven with absolute certainty. It is sufficient if the evidence affords a greater probability than not that the event occurred in such a way as to fix liability on the person charged. The trier of fact must recognize the distinction between mere conjecture and a reasonable inference. Gardner v. Seymour, 27 Wn.2d 802, 808-9, 180 P.2d 564 (1947) (quoting Home Ins. Co. of New York v. N. Pac. Ry., 18 Wn.2d 798, 802, 140 P.2d 507 (1943). There may be more than one proximate cause of an injury. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 676, 709 P.2d 774 (1985).

Regardless of whether or not DOC was statutorily authorized to supervise Villanueva-Villa, it is not too remote to find liability on the part of DOC in this matter. There is no question that DOC had Villaneuva-Villa in its custody and control when it failed to arrest him on his two outstanding DUI warrants. Villanueva-Villa was day reporting to DOC during the time period of both arrests and the issuance of both warrants for

his failure to appear. (CP 244-250). In fact, DOC has at least 17 contacts with Villanueva-Villa while at least one of the outstanding warrants for his arrest was pending. DOC further failed to inform the court of Villanueva-Villa's prior violations, his two new DUI arrests, as well as his failure to appear at both DUI arraignments when it closed supervision of Villaneuva-Villa on January 13, 2006 (CP 48-49 and CP 377-381). In fact, DOC's records state that he was in compliance. (CP 259). If not for DOC's failure to act in these instances, it is probable that Villanueva-Villa would have been incarcerated and off the streets or that he would have at least been prevented from drinking alcohol and Mr. Myles' death could have been prevented. If a jury determines that cause in fact does indeed exist in this case, then legal causation would also exist and liability would attach as a matter of law. Given these facts, both cause in fact and legal causation in this case should be determined by a jury and not on summary judgment.

IV.

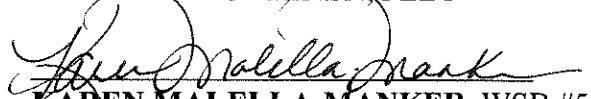
CONCLUSION

As a result of DOC's failure to present legal argument or authority within its Answer as to the question of proximate cause, Petitioner Myles is unable to properly respond to this issue. Petitioner Myles has offered a generic response based on the issue as it relates to the case at hand.

However, because of the obvious lack of ability to prepare a proper or relevant argument, Petitioner Myles requests that the Court refrain from considering the issue of proximate cause when making its ruling on whether or not to grant review in this matter.

RESPECTFULLY SUBMITTED this 8th day of November, 2018.

GREENEN & GREENEN, PLLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2018, I served the foregoing Reply to Answer for Petition for Review upon the following:

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by electronic mail and also by mailing a copy thereof certified by me as such, contained in a sealed envelope, with postage paid, addressed to said court/attorneys at their regular office addresses as noted above and deposited in the post office at Vancouver, Washington. Between said post office and the addresses to which said copies were mailed, there is a regular communication by US. Mail.

Dated this 8th day of November, 2018.

/KAREN MALELLA-MANKER

GREENEN & GREENEN, PLLC

November 08, 2018 - 11:26 AM

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